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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5276 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.
2. To be referred to the Reporter or not? Yes.

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3. Whether Their Lordships wish to see the fair copy of the judgement? No.
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.
5. Whether it is to be circulated to the Civil Judge? No.

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CHATURBHAI DAHYABHAI VAGHELA

Versus

SURABHAI SOMABHAI VAGHELA

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Appearance:

MR AJ PATEL for Petitioners

MR HARIN P RAVAL for Respondents.

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 01/12/97

ORAL JUDGEMENT

The challenge has been made by the petitioner by this special civil application to the order of the Revenue Tribunal dated 3-11-1988 passed in Revision

Application No. TEN.B.A.722/83. In Tenancy Case No. Chaklasi/32G/1 of 1980, Mamlatdar & A.L.T., Nadiad vide its order dated 23-4-1982 decided that the respondents herein were tenants of the land bearing Survey No.1784/1. But as the predecessor of Mamlatdar & A.L.T. had decided the matter u/s 32G of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as the Act) holding that as these respondents were cultivating the land under the conditional sale and the matter was closed, till that order is set aside, it operates as res judicata. Though, on merits the matter was decided in favour of the respondents but on the ground aforesaid relief was not granted. Against this order of the Mamlatdar & A.L.T., Nadiad the respondents preferred an appeal before the Dy. Collector, Nadiad being Tenancy Appeal No. 111 of 1982. That appeal came to be allowed by the Appellate Authority on 7-3-1983 and against the said the order of the Dy. Collector, Nadiad the petitioners filed Revision Application before the Gujarat Revenue Tribunal, Ahmedabad and that revision application was came to be dismissed under the order dated 3-11-1988, hence this special civil application.

2. The petitioner no.1 is purchaser of the land in question from the petitioner no. 2 and he is also joined as a party to this special civil application.

3. Learned counsel for the petitioners contended that the Dy. Collector, Nadiad as well as the Gujarat Revenue Tribunal, Ahmedabad has fell in serious error of law in deciding the matter in favour of the respondents by resorting to the provisions of Section 25A of the Act. The provisions of Section 25A of the Act are only applicable where the land is mortgaged by way of usufructuary mortgage and not otherwise. In the present case, the mortgage was not an usufructuary mortgage but it was a mortgage by conditional sale and so it is not the case of putting of the tenancy in abeyance during the period of mortgage and consequential revival of the same after redemption thereof. Though it is a case of mortgage and redemption thereof, but very basic requirements of applicability of Section 25A of the Act is not present in this case.

4. On the other hand, learned counsel for the respondents contended that the petitioners have also filed civil suit for possession and declaration of their rights and in view of this fact, this writ petition is not maintainable. It is further contended that the respondents are in possession of the land in dispute. Lastly learned counsel for the respondents urged that it

is a case of mortgage of the land and redemption thereof and as such the provisions of Section 25A of the Act have rightly been made applicable in the present case. Additional contention has been made by the learned counsel for the respondents that the petitioner no. 1 has no locus standi in the matter as he was not a party to the revision application or the proceedings which gives rise to the revision application.

5. I have given my thoughtful consideration to the submissions made by the learned counsel for the respondents.

6. Learned counsel for the respondents have read the relevant portion from the order passed by the Dy. Collector made in the appeal and of revisional authority and he failed to point out that the said authorities have considered the document with reference to the question whether it is mortgage by conditional sale or an usufructuary mortgage. By reading the translation of mortgage deed and document of extension of term thereof the learned Counsel for the petitioners made efforts to satisfy the court that looking to the terms and conditions of the documents it cannot be said that it is usufructuary mortgage. Learned counsel for the petitioner read the relevant portion of the judgment of the tribunal and I do not find that the tribunal has considered these documents with reference to ascertain the nature of mortgage and it has nowhere recorded the findings that the mortgage in question was usufructuary mortgage.

7. So far as the other contentions raised by the learned counsel for the respondents it is suffice to say that I am not deciding this matter on merits. Otherwise also the question with respect to which of the parties in possession of the suit property is hardly relevant in this special civil application at this stage. This Court by way of interim relief directed for maintaining of the status-quo. Moreover, the question which of parties in possession of the suit property is not necessarily to be gone in to at this stage as, as per the case of the respondents, it is a sub-judicious matter before the civil court and that is another ground, I do not consider it necessary to go into all these questions. However, it is true that the petitioner no. 1 was not a party before the revisional authority. It is not in dispute that he is the purchaser of the land in question from the petitioner no. 2. So, it cannot be said that he is altogether a stranger to the proceedings. His interest has been created in the land in dispute. Only

on the ground that the petitioner no. 1 was not a party before the revisional authority this petition cannot be rejected more so when admittedly he is a purchaser of the disputed land and vendor is also petitioner with him. Question of agricultural land tenancy has gone into and to be decided by the revenue authorities and as such the filing of the suit by the petitioners for declaration and possession may not be fatal to the maintainability of this special civil application.

8. Section 25A of the Act provides that if any land is mortgaged by a landlord by way of usufructuary mortgage to a tenant cultivating such land, the tenancy of such land shall be in abeyance during the period the mortgage subsists. After expiry of the said period it shall, notwithstanding any other law for the time being in force, be lawful to the tenant to continue to hold the land on the terms and conditions on which he held it before the mortgage was created. So, the conditions of applicability of the provisions of Section 25A of the Act is that the land is mortgaged by the landlord by way of mortgage. But protection seems to have been provided by the Legislature only to those tenants to whom the land has been mortgaged by the landlord by way of usufructuary mortgage. Mortgages of other class are prima facie excluded from the purview of Section 25A of the Act.

9. In the present case, none of the authorities below has addressed on this vital issue i.e. nature of the mortgage of the land by the landlord in favour of the respondents' predecessor. The three authorities below have proceeded under the presumption as if all types of mortgages are covered under the provisions of Section 25A of the Act. Learned counsel for the petitioners has placed reliance on the Division Bench decision of this Court in the case of Patel Mohanlal Prabhudas & Ors. Vs. Bai Rai Wd/o Patel Jethabhai Kishordas & Ors., reported in XVII GLR P. 442, and contended that this matter is covered by the aforesaid decision. I do not consider it appropriate to make any comments on this contention as I am of the opinion that this matter deserves to be remanded back for deciding it afresh with reference to the nature of the mortgage after taking into consideration documents of mortgage of the land in question. For the purpose of deciding the nature and character of the mortgage all the documents are to be taken into consideration and then basic question of the nature and character of mortgage has to be dealt with by the authorities below. This exercise has not been undertaken by any of the authorities i.e. Mamlatdar & A.L.T., Dy. Collector and the Tribunal and there is no

decision on this vital question in either of the judgments of the authorities aforesaid. It is a case where the provisions of Section 25A of the Act have been put into service by the authorities below without going into question whether these provisions are applicable or not in the present case.

10. In the result, this special civil application succeeds and the same is allowed and the order of the Gujarat Revenue Tribunal dated 3-11-1988 passed in Revision Application No. TEN.B.A.722/83 is set aside and the matter is remanded back to the Tribunal with a direction to restore the revision application to its original number and to decide the nature and character of the mortgage deed in question and then to decide the question of applicability of Section 25A of the Act to the facts of this case. The matter is old one and it is expected from the Tribunal to decide the same expeditiously say within six months from the date of receipt of writ of this order. Rule is made absolute in terms aforesaid. No order as to costs.

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